Supreme Court, U.S.
FILED

No. 94-851

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1602 et seq.) authorizes a United States court to exercise jurisdiction over a claim brought by Japanese citizens against an agency of the Mexican Government, for the wrongful death of Japanese passengers in an airplane operated by an independent Mexican common carrier which crashed while on approach to a Mexican airport, based solely on the fact that because poor visibility conditions forced the plane to use an approach to the airport which briefly traversed over United States territory, the acts of the pilot which allegedly caused the crash occurred over United States airspace.

(2) Whether jurisdiction can be found to exist under the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act based on the unexpected and unauthorized acts of an independent contractor.

(3) Where a finding of jurisdiction under the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act has been made on an erroneous basis after an interlocutory appeal, can the Court of Appeals after trial find jurisdiction to exist on an entirely new basis that was not litigated before the District Court.

PARTIES TO THE PROCEEDING

The petitioner is EXPORTADORA DE SAL, S.A. DE C.V., a Mexican corporation owned in majority part by the Government of the United States of Mexico.

The respondents, who are citizens of Japan, are HIROKO SUGIMOTO, MITSUKUNI SUGIMOTO, YASUNOBU SUGIMOTO, KIMIKO KODANI, MAYUMI NUKIWA, KYOKO KODANI and KUNIKO OMACHI, individually and as guardian ad litem on behalf of ERI OMACHI, a minor.

RULE 29.1 LISTING

Petitioner EXPORTADORA DE SAL, S.A. DE C.V., is a foreign corporation, owned in majority part by the Government of the United States of Mexico, and has no parent corporation and no subsidiaries or affiliates which issue shares to the public.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

EXPORTADORA DE SAL, S.A. DE C.V., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this action.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 19 F.3d 1309 (Exhibit "B" to the concurrently filed Appendix, at pp. 2 to 11). The opinion of the District Court is unreported (Exhibit "C" to the Appendix, at pp. 12 to 87). An earlier opinion of the Court of Appeals, dealing with the jurisdiction issue on an interlocutory appeal, is reported at 930 F.2d 777 (Exhibit "D" to the Appendix, at pp. 88 to 103).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 25, 1994. The Court of Appeals denied a timely petition for rehearing on August 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

EXPORTADORA DE SAL, S.A. DE C.V., ("EXPORTADORA") is a Mexican corporation, owned in majority part by the Government of the United States of Mexico, and is therefore considered a "foreign state" for the purposes of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 et seq.). Pursuant to the FSIA, foreign states are presumptively immune from the jurisdiction of the United States courts. However, the court below held that EXPORTADORA was not entitled to immunity from jurisdiction under the FSIA, because of the operation of the "commercial activity" exception set forth in the first clause of 28 U.S.C. § 1605(a)(2). At issue here is the interpretation and application of that exception to foreign sovereign immunity. The first clause of 28 U.S.C. § 1605(a)(2), and other relevant provisions of the FSIA, are set forth in Appendix E (at pp. 104-105).

STATEMENT OF THE CASE

The instant litigation arises out of an airplane crash which resulted in the death of the pilot and the five passengers on board. The aircraft was owned by a certified Mexican common carrier, and was flown by a Mexican pilot. The flight had been contracted for by EXPORTADORA, a Mexican corporation whose majority shareholder is the Mexican Government. The plane was flying

from Guerrero Negro, Mexico, and was scheduled to land at Tijuana, Mexico.

Respondents are Japanese citizens, who are seeking damages for the death of three Japanese citizens who were passengers on the aircraft. Respondents claim that the pilot negligently operated the aircraft so as to cause it to be at an insufficient altitude as it approached the Tijuana airport, thereby causing the plane to crash.

The foregoing are the facts upon which respondents' claims against EXPORTADORA are based. However, the Court of Appeals has relied on one additional fact to find that the United States courts could properly assert jurisdiction over EXPORTADORA in this action. Specifically, when the alleged negligent acts were committed which caused the plane to crash, it was flying in United States airspace. As the plane flew into the vicinity of Tijuana, it encountered poor visibility conditions. Accordingly, the pilot used an alternate approach to the Tijuana airport which briefly swung over United States territory. While approaching the Tijuana airport, but while still a few miles north of the border, the plane crashed. It is upon this fortuitous connection with the United States that the Court of Appeals found jurisdiction to exist over an action brought by Japanese citizens against an agency of the Mexican Government.

A. FACTS

EXPORTADORA is a Mexican corporation, owned in majority part by the Mexican Government; its sole minority shareholder is the Mitsubishi Corporation of Japan. EXPORTADORA is engaged in the business of manufacturing and selling salt, and its principal place of business is located in Guerrero Negro, Baja California Sur, Mexico.

In September of 1987, Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi visited Guerrero Negro. Sugimoto and Kodani were professors of agriculture at the Tottori University in Hamasaka, Japan. With the cooperation of the Governments of Mexico and Japan, agricultural professors at the University were conducting a small agricultural experiment on land owned by the Mexican Government which is adjacent to EXPORTADORA's facilities, and Professors Sugimoto and Kodani wanted to visit that experiment. Omachi was a purchasing agent for the Asahi Chemical Company of Japan, who wished to tour EXPORTADORA's facilities in Guerrero Negro while he was on a previously scheduled business trip to other cities.

EXPORTADORA agreed to arrange for transportation to Guerrero Negro and back for Sugimoto, Kodani and Omachi. EXPORTADORA did so for Omachi as a courtesy; Sugimoto and Kodani were transported at the direction of the Mexican Government, pursuant to an agreement for technical cooperation between the governments of Mexico and Japan. No charge for the transportation arrangements was made to Sugimoto, Kodani or Omachi, or to their employers.

All of the actual decisions regarding the travel arrangements were made in Mexico and in Japan. However, some of the communications regarding those arrangements were made from a small office in San Diego, California, which EXPORTADORA maintains for the purpose of facilitating its purchase of equipment for its operations in Guerrero Negro. Employees of EXPORTADORA's San Diego office met Sugimoto, Kodani and Omachi in San Diego, and transported them via van to the Tijuana airport, from which they were flown to Guerrero Negro on EXPORTADORA's company plane.

Sugimoto, Kodani and Omachi all planned to leave Guerrero Negro on September 30, 1987. The company plane was

being used on that date for a Board of Directors meeting in Mexico City, so EXPORTADORA contracted with an independent commuter airline to make the flight from Guerrero Negro to Tijuana. The commuter airline selected was Aviones de Sonora ("Aviones"), a certified regional commuter airline for over 30 years, which had been licensed as a Mexican national commuter airline since 1979. Aviones was fully licensed and certified by the Government of Mexico to provide airline services, and it owned and operated ten aircraft. Aviones had an excellent reputation, and had experienced no serious accidents or fatalities. The District Court specifically found that Aviones was an independent contractor and a Mexican common carrier, and that "Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator."

On the morning of September 30, 1987, shortly after 6:00 a.m., the Aviones flight left Guerrero Negro with Sugimoto, Kodani and Omachi on board.[1] The pilot of the Aviones flight had been instructed to fly to the Tijuana airport, and was told that if the weather conditions in Tijuana were unfavorable, he should fly on to Mexicali, Mexico. However, when the Aviones plane left Guerrero Negro, all of the available Mexican weather reports indicated the visibility and weather conditions in Tijuana would be favorable at the time planned for arrival.

Unfortunately, by the time the airplane came into the vicinity of Tijuana, the weather had changed, and zero visibility conditions existed at the airport. Although the pilot indicated that he wanted to fly on either to Mexicali or Tecate, the Tijuana air

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1 Also aboard the plane at that time were Ramon Schoenberg and Manuel Hernandez, who were developing a new business selling pumps, and had come to Guerrero Negro to solicit future sales of their product to EXPORTADORA. The survivors of Mr. Schoenberg and Mr. Hernandez settled out of this action prior to trial.

traffic controller encouraged the pilot to land in Tijuana. Because of the poor visibility conditions, the pilot was instructed to use an alternate approach to the airport. Specifically, a "Letter Agreement" between Mexican and United States aviation authorities authorized planes to use an approach in bad weather conditions which would swing over United States territory shortly before the landing at the Tijuana airport.

Following the air traffic controller's instructions, the pilot continued his approach to the airport. For reasons which are now unknown, and which never will be known, the plane failed to maintain sufficient altitude, and it crashed into the side of a hill located shortly before the beginning of the airstrip, a few miles north of the Mexico-United States border. All of the passengers on the airplane, and the pilot, died in the crash.

B. PROCEEDINGS BELOW

The survivors of Sugimoto, Kodani and Omachi, and of the other two passengers on the flight, brought wrongful death actions in the California state court and in the United States District Court. The state court actions were removed to the District Court pursuant to 28 U.S.C. 1441(d), which provides that any civil action brought in a state court "against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States..." The actions were then all consolidated in the District Court.

EXPORTADORA's first responsive pleading in the litigation was a motion to dismiss, on the ground that EXPORTADORA was immune from the District Court's jurisdiction because it is a "foreign state" for the purposes of the Foreign Sovereign Immunities Act. When the motion to dismiss was denied, EXPORTADORA appealed the District Court's order to the Ninth Circuit Court of Appeals. Thereafter, the Court of

Appeals issued its decision in Schoenberg v. Exportadora, 930 F.2d 777 (9th Cir. 1991) (Exhibit "D" to the Appendix), affirming the District Court's ruling that jurisdiction existed under an exception to the immunities provided by the FSIA, the first clause of 28 U.S.C. 1605(a)(2).

Trial commenced on January 11, 1993. On the first day of trial, the District Court ruled that it would not reconsider either the factual findings or the legal conclusions reached by the Court of Appeals in its prior determination of the jurisdiction issue. Closing argument was held on March 8, 1993, and shortly thereafter the District Court prepared its "Findings of Fact and Conclusions of Law" (Exhibit "C" to the Appendix). The District Court found that the crash was caused by the negligence of the Aviones pilot. The District Court also held that EXPORTADORA had vicarious liability for that negligence, because (1) it had breached a non-delegable implied covenant of non-negligent transportation; (2) it had breached a non-delegable tort duty to provide non-negligent transportation; and (3) it was estopped to deny Aviones' ostensible agency. Damages were awarded in the amount of $3,656,752.39, and judgment was entered on May 11, 1993.

EXPORTADORA filed a timely appeal from that judgment on May 12, 1993. The appeal challenged the District Court's rulings regarding pilot error and vicarious liability. Additionally, in the statement of jurisdiction contained in its opening brief, EXPORTADORA noted that shortly after the trial had ended, the Supreme Court issued its decision in Saudi Arabia v. Nelson, ___ U.S.___, 113 S.Ct. 1471, 123 L.Ed. 2d 47 (1993). EXPORTADORA argued that this new opinion of the Supreme Court established that the Ninth Circuit's decision on the interlocutory appeal had not applied the proper test for the existence of jurisdiction under the FSIA, and that using the proper test, jurisdiction did not exist. EXPORTADORA therefore requested the Court to reconsider the issue, and to allow

supplemental briefing regarding jurisdiction. On January 12, 1993, the Court of Appeals issued an order requesting the parties to file a "letter brief" addressing the issue of "whether there is jurisdiction in this case after Saudi Arabia v. Nelson..."

On March 25, 1994, the Ninth Circuit filed its decision affirming the District Court's judgment (Exhibit "B" to the Appendix). While not ruling on the merits of any of the specific theories of liability advanced by the District Court, the Ninth Circuit held that EXPORTADORA did have vicarious liability for the negligence of the Aviones pilot. Additionally, the Ninth Circuit held that the District Court properly asserted jurisdiction over EXPORTADORA pursuant to the "commercial activity" exception to the FSIA. Specifically, the court held that:

> According to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. Id. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space.

On April 8, 1994, EXPORTADORA filed a timely petition for rehearing, and a suggestion for rehearing en banc, with the Ninth Circuit Court of Appeals. In the petition, EXPORTADORA requested reconsideration of the holdings regarding vicarious liability, burden of proof, and jurisdiction. On May 3, 1994, the Ninth Circuit directed respondents to file a response to the petition for rehearing. On August 2, 1994, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (Exhibit "A" to the Appendix).

REASONS FOR GRANTING THE PETITION

The doctrine of foreign state sovereign immunity was "judicially created to effectuate general notions of comity among nations..." First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762, 92 S.Ct. 1808 (1972). The FSIA was enacted to codify these "notions of comity," and to provide a nationwide and "'uniform body of law' concerning the amenability of a foreign sovereign to suit in the United States courts." First National City Bank v. Banco para el Commercio Exterior de Cuba, 462 U.S. 611, 622 n.11, 103 S.Ct. 2591 (1983).

The Ninth Circuit's decision in this case fails to respect the sovereignty of the Government of the United States of Mexico, and fails to promote uniformity of decision in this area of the law. Specifically, by allowing an action to be brought in the United States because of an insubstantial and fortuitous connection with this country, when in fact plaintiffs' claims are based on events which occurred in Mexico, the Ninth Circuit has improperly usurped the jurisdiction of the Mexican legal system. And, in so doing, the Ninth Circuit has departed from the holding of this Court, and of other Courts of Appeals, that jurisdiction under the first clause of the "commercial activities" exception can only be found where the plaintiff's claim is "based upon" commercial activities of the foreign sovereign in the United States which have a "substantial contact" with the United States.

As evidenced by the recent passage of the North American Free Trade Agreement, there will be increasing interactions between nations in the future, and in particular between the Governments of Mexico and the United States. It is therefore exceedingly important that this Court provide further guidance as to the jurisdictional reach of the United States courts in actions involving foreign sovereigns. This case presents an appropriate vehicle for such guidance, as the Ninth Circuit's decision

improperly expands the jurisdictional reach of the United States courts, and is erroneous.

A. THE COURT OF APPEALS' APPLICATION OF THE "COMMERCIAL ACTIVITY" EXCEPTION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

When the Court of Appeals first addressed EXPORTADORA's claim of foreign sovereign immunity, on the interlocutory appeal from the District Court's denial of EXPORTADORA's motion to dismiss, it held that jurisdiction existed under the first clause of 28 U.S.C. § 1605(a)(2). That first clause creates an exception to sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state..." The Court of Appeals held that EXPORTADORA's San Diego office had been involved in the travel arrangements related to decedents, and that this was "commercial activity" of EXPORTADORA which had a substantial contact with the United States. Accordingly, the Court of Appeals held that the District Court had jurisdiction over EXPORTADORA under the first clause of the "commercial activity" exception.

At the trial in this action, the District Court refused to reconsider the Court of Appeals' jurisdiction holding. However, after the District Court issued its decision in the case, this Court decided Saudi Arabia v. Nelson, ___ U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In that case, the Supreme Court held that jurisdiction cannot be found to exist merely because the foreign state engaged in commercial activities which had a substantial contact with the United States. Rather, the Court held that the plaintiffs' action must also be "based upon" the commercial activities performed in the United States.

The Court of Appeals in its prior decision did not recognize or consider this "based upon" requirement. And, in

fact, the plaintiffs' action was not "based upon" the purported commercial activities which the Court had found were performed in the United States by EXPORTADORA. Consequently, in its brief on appeal, EXPORTADORA requested the Court of Appeals to reconsider its prior jurisdictional decision in light of Saudi Arabia v. Nelson, and requested permission to provide further briefing on the issue. The Court granted this request, and ordered the parties to provide supplemental briefing on the issue of jurisdiction.

In its subsequent decision, the Court of Appeals for the first time recognized the requirement that an action be "based upon" the commercial activity carried on in the United States by the foreign state. However, the Court did not (and indeed could not) hold that plaintiffs' action was "based upon" the San Diego office's communication of travel arrangements. Instead, the Court completely ignored its previous ruling, and found jurisdiction on an entirely different basis. That is, the Court held that EXPORTADORA was engaged in commercial activity within the United States when the Aviones plane flew into United States airspace, and that plaintiffs' claim was based on the tortious flying of that plane in United States airspace.

Both decisions of the Court of Appeals are incorrect, and both are in conflict with the decisions of this Court and other Courts of Appeals. The first decision completely overlooks the requirement that the plaintiffs' action be "based upon" the commercial activity of the foreign sovereign performed in the United States; the second decision ignores the requirement that the action be based upon commercial activity of the foreign sovereign which has a "substantial contact" with the United States.

1. The First Decision Fails To Support The Exercise of Jurisdiction Over EXPORTADORA

In its first jurisdiction decision, the Court of Appeals held that the exception to immunity set forth in the first clause of 28

U.S.C. § 1605(a)(2) was applicable. The Court held that:

> The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that the commercial activity have "substantial contact with the United States."

Appendix D, at p. 95.

The Court of Appeals held that these "two components" existed in this case. Specifically, the Court held that EXPORTADORA was engaged in "commercial activity" when it arranged for the decedents' transportation to Guerrero Negro and back (even though EXPORTADORA was not paid for this service). And, although the actual decisions regarding travel were all made in Mexico and Japan, the Court held that this "commercial activity" had a "substantial contact" with the United States because employees of EXPORTADORA's San Diego office were involved in communicating the travel arrangements, and picked up the decedents in San Diego to transport them to the Tijuana airport. The Court held that EXPORTADORA's San Diego office was "involved in arranging the trip, no matter where the decisions were made." Id. at 97, n.2. Accordingly, "[t]he fact that the transportation was arranged through the San Diego office and the trip began in that city provides a sufficient nexus with the United States." Id. at 98.

However, after the Court of Appeals' decision, this Court issued its decision in Saudi Arabia v. Nelson, establishing that the Court of Appeals completely overlooked an essential third requirement for finding jurisdiction under the first clause of section 1605(a)(2). Specifically, in Saudi Arabia v. Nelson, the Court clarified that in addition to the two requirements identified by the Court of Appeals, it must also be found that the plaintiffs' action

is "based upon" the commercial activities performed in the United States – the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States..." Id. at 113 S.Ct. 1477. Observing that the term "based upon" is not defined in the FSIA, the Court stated:

> [T]he phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); accord, Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less")...

Id. at 113 S.Ct. 1477.

The Court in Saudi Arabia v. Nelson held that, while the plaintiffs' action had a "connection with, or relation to, commercial activity" of the defendant in the United States, and "these activities led to the conduct" which injured plaintiffs, the action was not "based upon" those activities. And, that being the case, jurisdiction did not exist under the first clause of the "commercial activities" exception.

The "commercial activity" in the United States which the Court of Appeals found to exist in the instant case was the nominal involvement of EXPORTADORA's San Diego office in communicating and facilitating the decedents' travel arrangements. However, while there was a "connection with, or relation to" the San Diego office's purported "commercial activity," plaintiffs' action was not in any sense "based upon" that activity.

The District Court found that EXPORTADORA's actual arrangement of transportation was in no way either negligent or in

breach of contract. Nothing improper or irregular occurred to the decedents in San Diego, or on their flight to Guerrero Negro. It is undisputed that the decision to use Aviones for the return flight was made in Guerrero Negro, and the District Court specifically found that "Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator." The District Court also held that once the flight left Guerrero Negro, EXPORTADORA had no control over it.

In the complaint in effect when the interlocutory appeal was taken (and in the complaint in effect when trial commenced), the only claim for relief alleged against EXPORTADORA was for negligence. Specifically, it was alleged that EXPORTADORA, through its supposed agent or joint venturer, Aviones, negligently operated the plane so as to cause it to crash. Obviously, this alleged negligence had nothing to do with the San Diego office's communication of travel arrangements. Plaintiffs' claim was based upon the activities of the Aviones pilot on approach to the Tijuana airport, and not on EXPORTADORA's "commercial activities" in the United States. In other words, the activities by EXPORTADORA's San Diego office were not one of the "elements of a claim" for negligence. And, where the activities in the United States are "legally irrelevant to [the] right of recovery," the action is not based upon those activities. Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146 (D.C. Cir. 1994).

Consequently, the Court of Appeals decision unquestionably failed to satisfy the requirements for application of the "commercial activities" exception set forth in the first clause of section 1605(a)(2) – jurisdiction was being premised on activities of EXPORTADORA in the United States which were not the basis for plaintiffs' action. The Court of Appeals is in effect using a "minimum contacts" test for jurisdiction – if the foreign sovereign has had any "commercial" dealings in the United States which in

any way relate to the activities at issue in the litigation, jurisdiction exists.

However, in specifying that jurisdiction could only be found when the action was actually "based upon" those commercial activities, Congress made it clear that such "minimum contacts" would not suffice. That being the case, the Court of Appeals' first decision in this case provides absolutely no justification for the exercise of jurisdiction over EXPORTADORA. To the contrary, the Court of Appeals' decision is a dramatic expansion of jurisdiction over foreign sovereigns, which is contrary to both the Congressional intent embodied by the FSIA, and to this Court's holding in Saudi Arabia v. Nelson.

2. The Court of Appeals' Second Decision Also Fails To Support The Exercise of Jurisdiction Over EXPORTADORA

Because the Court of Appeals had specifically found that jurisdiction existed, the District Court at the trial in this action refused to allow further argument on the issue. Rather, the District Court held that the existence of jurisdiction over EXPORTADORA was the law of the case, and that the issue would not be revisited.

After trial, the District Court issued a judgment finding that the crash was the result of negligence on the part of the Aviones pilot. The District Court also held that EXPORTADORA was vicariously liable for that negligence, on three separate theories: (1) breach of an implied covenant of non-negligent transportation, (2) breach of a tort duty of non-negligent transportation, and (3) ostensible agency.

The decedents' travel to Guerrero Negro was accomplished without incident, and the District Court found that in arranging for the decedents' return flight on Aviones, EXPORTADORA

contracted with a "licensed, qualified and fully competent air taxi operator." Accordingly, the breach of the alleged contract and tort duties to provide non-negligent transportation did not occur until the plane crashed as an alleged result of the Aviones pilot's failure to maintain proper altitude on approach to the Tijuana airport. This purported negligence, occurring on a flight which had been contracted for in Mexico, and occurring long after the flight left Guerrero Negro, had absolutely no causal connection with the alleged commercial activities by EXPORTADORA's San Diego office. Indeed, according to plaintiffs, the San Diego office arranged for the decedents to return on a different plane, the EXPORTADORA company aircraft. Consequently, it is clear that liability for breach of an implied covenant or tort duty to provide non-negligent transportation was not "based upon" the purported commercial activities of EXPORTADORA in the United States.

The third basis of liability found by the District Court was ostensible agency. That is, the District Court found (without any actual evidence from plaintiffs on the issue) that the decedents may have believed that EXPORTADORA was performing the flight, or that Aviones was acting as EXPORTADORA's agent in performing the flight. That being the case, the District Court held that Aviones was EXPORTADORA's ostensible agent, and that EXPORTADORA was therefore responsible for the pilot's alleged negligence. However, the decision to contract with Aviones was undisputedly made in Mexico, long after the decedents had left San Diego. Consequently, any act or omission by EXPORTADORA which purportedly led the decedents to believe that Aviones was its agent occurred in Mexico. The ostensible agency theory of liability was not "based upon" EXPORTADORA's alleged commercial activities in the United States.

After the District Court made its determination, this Court issued its decision in Saudi Arabia v. Nelson, making it clear that, for jurisdiction to exist, the plaintiffs' claims must be "based upon"

commercial activity of the foreign sovereign in the United States. Consequently, in its brief on appeal, EXPORTADORA requested the Court of Appeals to reconsider the previous jurisdictional ruling, and requested permission to file supplemental briefing on the issue. The Court of Appeals thereafter ordered the parties to file a "Letter Brief" addressing the issue of "[w]hether there is jurisdiction in this case after Saudi Arabia v. Nelson..."

In its subsequent decision, the Court of Appeals revisited the issue of jurisdiction, and held that the "based upon" test emphasized in Saudi Arabia v. Nelson had been satisfied. In so doing, however, the Court of Appeals completely ignored the first Court of Appeals decision, and completely ignored the theories of liability advanced by the District Court. That is, the Court of Appeals did not find that jurisdiction existed because of the alleged "commercial activities" of EXPORTADORA's San Diego office, or that any of the three theories of liability found by the District Court were "based upon" those "commercial activities." Rather, the Court of Appeals simply held that:

> According to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. Id. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

Appendix B, at p. 7.

As can be seen, the Court of Appeals in its decision has found an entirely new basis for jurisdiction, which was not argued

by the plaintiffs below, which was not relied on by the District Court, and which was not relied on by the Court of Appeals in its earlier decision. Jurisdiction has been held to exist because of the mere fortuitous circumstance that, on a two hour flight through Mexico, the plane happened to have crashed during the few minutes it was in United States airspace on approach to the Tijuana airport. EXPORTADORA respectfully submits that jurisdiction cannot be based on this coincidence.

a. Jurisdiction Cannot Be Based Upon The Activities Of An Independent Contractor

The District Court specifically found that Aviones was an "independent contractor." The District Court found that Aviones was a Mexican common carrier. The District Court found that Aviones was "licensed, qualified and fully competent." The District Court found that the flight at issue did not involve any "peculiar risk." And, the District Court held that EXPORTADORA had no control over the flight after it left Guerrero Negro.

In these circumstances, it makes no sense to hold that EXPORTADORA was engaged in commercial activity in the United States when the Aviones flight flew into United States airspace. Under both United States and Mexican law, Aviones and EXPORTADORA are separate entities. EXPORTADORA contracted for the flight in Guerrero Negro, and as soon as that flight left Guerrero Negro, EXPORTADORA had no more control over its activities. The brief intrusion into United States territory only occurred because of the poor visibility conditions in Tijuana, which required use of an approach, specified in a "Letter Agreement" between United States and Mexican aviation authorities, which briefly swung over United States territory. However, EXPORTADORA had specifically requested the pilot to fly on to another airport, located in Mexicali, Mexico, if he encountered poor weather in Tijuana.

Consequently, the flight's presence in United States airspace was not expected by EXPORTADORA, was not intended by EXPORTADORA, and was not even authorized by EXPORTADORA. That presence in United States airspace occurred when the flight was in the control of an independent contractor, which was also a common carrier.

While the propriety of the Court of Appeals' attribution to EXPORTADORA of the acts of an independent contractor in order to find jurisdiction would appear to be a question of first impression, analogous cases clearly establish that the Court of Appeals erred. Specifically, cases have held that jurisdiction over a foreign corporation cannot be based on the acts of a legally distinct foreign corporation, merely because they are both owned by the same foreign state. It therefore makes even less sense to hold that jurisdiction over a foreign government owned corporation can be based on the acts of a privately owned independent contractor.

In First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-627, 103 S.Ct. 2591 (1983), the Court held that "government instrumentalities established as judicial entities distinct and independent from their sovereign should normally be treated as such." Although that case was dealing with a determination of substantive liability, the Courts of Appeals have relied on this presumption of separation when making jurisdictional determinations under the FSIA involving the application of the "commercial activities" exception. See Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 533 (5th Cir. 1992), cert. den. 113 S.Ct. 413 (1992); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446-447 (D.C. Cir. 1990); Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 564-565 (11th Cir. 1987).

Most instructive in this regard is the recent decision in Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993), cert. den. 114 S.Ct. 1644 (1994). The plaintiffs

in that case argued that jurisdiction should be asserted over a corporation owned by a foreign state, because that corporation was the parent of two subsidiaries which were engaged in commercial activity in the United States, and plaintiffs' action was based upon that commercial activity. The Court of Appeals reversed the District Court's determination. The Court first noted that the District Court's holding:

> [V]iolates the important principle that the acts of separate corporations established by foreign governments should not be attributed to related foreign entities unless doing so would 'work fraud or injustice.'

Id. at 1286. The Court then held that:

> [A] district court cannot exercise jurisdiction over a foreign state under the first clause of the FSIA commercial activity exception unless it finds a sufficient jurisdictional connection or nexus between the commercial activity engaged in by that particular foreign entity and the United States.

Id. at 1287 (emphasis added).

Here, the Court of Appeals' finding of jurisdiction was not based upon any acts of EXPORTADORA which were conducted in the United States. Rather, jurisdiction was found by attributing to EXPORTADORA the brief, unexpected and unauthorized commercial activities of Aviones in the United States. And, the District Court specifically held that Aviones was a common carrier, and was a licensed, qualified and competent independent contractor. No "fraud or injustice" would result if Aviones' separate legal identity is respected; but an improper expansion of jurisdiction is accomplished if that separate identity is ignored.

Further, allowing jurisdiction to be based on vicarious

liability for the acts of independent contractors defeats one of the primary purposes of the FSIA, the development of "'a uniform body of law' concerning the amenability of a foreign sovereign to suit in the United States courts." First National City Bank v. Banco para el Commercio Exterior de Cuba, 462 U.S. 611, 622 n.11, 103 S.Ct. 2591 (1983). In this case, the Ninth Circuit relied on California law to find that EXPORTADORA was vicariously liable for the Aviones flight. The use of a test for jurisdiction which will vary from state to state obviously precludes the development of a "uniform body of law." It is respectfully submitted that the goal of achieving a "uniform body of law" under the FSIA is best served by reversing the Ninth Circuit's decision, and holding that jurisdiction cannot be imposed based on the acts of an independent contractor.

b. The Alleged Commercial Activity Did Not Have A Substantial Contact With The United States

Even if it is assumed that EXPORTADORA was somehow engaged in "commercial activity" in the United States because the Aviones plane was briefly flying in United States airspace, that activity still does not suffice to create jurisdiction. This is because the alleged "commercial activity" did not have a "substantial contact" with the United States.

The Court of Appeals held that "according to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." As it did in its first decision, however, the Court of Appeals has omitted one (albeit a different one) of the requirements elucidated in Saudi Arabia v. Nelson – that the commercial activity upon which the action is based must have some "substantial contact" with the United States. Or, as stated in Saudi Arabia v. Nelson, the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States."

113 S.Ct. at 1477 (emphasis added). And, here, the commercial activity held to exist by the Court of Appeals did not have a substantial contact with the United States.

Assuming that the Aviones flight could be considered "commercial activity" of EXPORTADORA[2/], it is still undisputed that the flight was contracted with to fly from an airport in Guerrero Negro, Mexico, to an airport in Tijuana, Mexico. There was no expectation or intent that the flight would at any time have any contact with the United States, let alone fly into United States airspace. After the flight had left Guerrero Negro, and long after it was beyond any control of EXPORTADORA, the Aviones pilot encountered bad visibility conditions in Tijuana, and therefore used the poor weather approach authorized pursuant to a "Letter Agreement" between the United States and Mexican Governments. In so doing, the pilot neglected to follow EXPORTADORA's instruction that, should poor weather conditions be encountered in Tijuana, he should fly on to the airport in Mexicali, Mexico.

Accordingly, the planes' unexpected, unintended, unauthorized, and brief swing over United States' airspace cannot be considered a commercial activity of EXPORTADORA which had a substantial contact with the United States. While the alleged negligence of the pilot was committed during the few minutes the plane was over U.S. territory, and the plane actually crashed in

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2/ Of course, EXPORTADORA does not concede that the Aviones flight can properly be considered a "commercial activity" of EXPORTADORA. It received no payment for the flight from any of the decedents, or from anyone else. As has been held in the Second Circuit, the test for "commercial activity" is "whether the activity is of the type an individual would customarily carry on for profit." Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984). While the Court of Appeals in its first decision held that EXPORTADORA might indirectly profit as a result of goodwill, such a motive for what was on its face a nonprofit flight cannot be used to create jurisdiction. Aschenbrenner v. Conseil Regional de Haute-Normandie, 851 F.Supp. 580, 585 (S.D.N.Y. 1994).

United States territory, this was nothing more than a fortuity. Other than its physical presence in United States airspace, the flight, and the crash thereof, had absolutely nothing to do with the United States. Indeed, the Ninth Circuit's test for jurisdiction turns on nothing more than the vagaries of the weather -- if the weather had been good in Tijuana, the flight would never have entered United States airspace. That being the case, it simply cannot be held that the mere presence of the flight over United States airspace, for a few minutes out of a two-hour trip, constituted a "substantial contact" with the United States. And, that being the case, jurisdiction cannot be exercised over EXPORTADORA on that basis.

To hold to the contrary creates the possibility of even more dramatic intrusions into the affairs of foreign governments. Given the reasoning of the Ninth Circuit in this case, jurisdiction could be asserted over claims arising out of any crash of a foreign sovereign owned or operated flight to the Tijuana airport, whether it departed from Mexico City or Moscow, solely because a negligent act of the pilot occurred while the plane was still north of the border during its approach to the Tijuana airport. Certainly, there would be no justification for an assertion of jurisdiction by the United States courts over claims against a foreign government by foreign citizens who were the survivors of foreign passengers on such a flight. However, if the mere fortuitous circumstance that the alleged negligent acts of the Aviones pilot occurred while over United States airspace is sufficient to establish jurisdiction, then there is no reason to deny jurisdiction over the claims of any foreign citizens arising out of negligent acts committed while in United States airspace.

This is a result which the Congress intended to avoid by enactment of the Foreign Sovereign Immunities Act. It is respectfully submitted that the Ninth Circuit Court of Appeals has twice attempted to unduly expand the reach of the first clause of the "commercial activities" exception to the FSIA, first by ignoring the requirement that the plaintiffs' action be "based upon"

commercial activities of the foreign sovereign in the United States, and then by ignoring the requirement that those commercial activities must have a substantial contact with the United States. Because both decisions are erroneous, and are contrary to the decisions of this Court, the instant petition should be granted.

c. The Court of Appeals' Post-Trial Determination Of The Basis For Jurisdiction Violates The Requirements Of The FSIA

As explained previously, the Court of Appeals in its interlocutory decision found jurisdiction to exist because EXPORTADORA was allegedly engaged in commercial activities in the United States when it helped facilitate the decedents' travel arrangements through its San Diego office. At trial, the District Court relied on the validity of that determination, and would not entertain any further argument regarding jurisdiction.

In its second decision on appeal, the Ninth Circuit completely ignored this jurisdictional finding, and held that jurisdiction existed because plaintiffs' action was based upon the "commercial activity" which occurred when the Aviones plane flew in United States airspace. This post-trial determination of a new basis for the jurisdictional ruling, after EXPORTADORA had been denied the opportunity to contest jurisdiction at trial, was a deprivation of EXPORTADORA's due process rights. Equally important, the Ninth Circuit's post-trial determination of the factual basis for jurisdiction thwarts one of the principal purposes of the FSIA, and contradicts established precedent that the determination of jurisdiction must be made as a preliminary matter, at the outset of the case.

It is settled that "sovereign immunity is an immunity from trial and the attendant burdens of litigation," and is "not just a defense to liability on the merits." Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574, 576 n.2 (7th

Cir. 1989), cert. den. 493 U.S. 937 (1989). See also United States v. Moats, 961 F.2d 1198, 1201 (5th Cir. 1992) ("the purpose behind collateral order appeals from denials of FSIA immunity is to effectuate the guarantee that immune parties will not become embroiled in litigation"). Given this purpose, it is the rule that sovereign immunity is a "critical preliminary determination." Federal Ins. Co. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1284 n.11 (3d Cir. 1993). "[P]roviding review only after trial would destroy the 'legal and practical value' of [the] sovereign immunity defense." Id. at p. 1282.

In the instant case, a "preliminary determination" of jurisdiction was made in the Court of Appeals' initial decision, but that decision was erroneous. The Court of Appeals' second decision was also erroneous, but additionally was based on findings which could only have been made after trial -- that despite Aviones' status as an independent contractor and licensed common carrier, EXPORTADORA still had vicarious liability for the Aviones flight. Although acknowledging that Aviones was indeed an independent contractor, the Court held that EXPORTADORA was still liable based on a general policies of California law, looking at such factors as "the party primarily to be benefited," who selected the contractor, whether the contractor was financially responsible and had insurance, etc.[2] These factors were not specifically litigated at trial, nor relied upon by the Court of Appeals in its previous decision.

By completely changing the basis for its jurisdictional determination, the Court of Appeals implicitly concluded that its prior decision was erroneous. However, the Court of Appeals'

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[2] It is ironic to note that, at least by the standards in effect in Mexico, Aviones most certainly was financially responsible, and was fully insured (its carrier paid benefits to the decedents' families). Only when judged by United States standards could Aviones be seen as lacking in its capitalization or insurance. And, given the lack of any legitimate basis for jurisdiction, United States standards should not be applied.

reliance upon a new basis which could not have been established prior to trial deprived EXPORTADORA of its right to a "preliminary determination" of jurisdiction. For this reason too, the Ninth Circuit's decision is erroneous.

B. ALLEGED ALTERNATIVE THEORIES OF JURISDICTION CANNOT BE CONSIDERED AT THIS TIME.

The assertion of jurisdiction by the District Court, and the jurisdictional determinations in both Court of Appeals decisions, were based exclusively on the first clause of 28 U.S.C. § 1605(a)(2). However, plaintiffs have at different times alleged alternative grounds for jurisdiction -- the second and third clauses of § 1605(a)(2), and the non-commercial torts exception set forth in 1605(a)(5). Also, while the appeal from the judgment was pending, plaintiffs argued for the first time that jurisdiction could be found pursuant to the waiver exception set forth in 28 U.S.C. § 1605(a)(1).

It is foreseeable that plaintiffs in their opposition to this petition will argue that, even though jurisdiction cannot properly be found the first clause of section 1605(a)(2), it can still be found under one of these alternative grounds. In fact, none of these exceptions to sovereign immunity are applicable. However, and equally important, these alternative bases for jurisdiction cannot now be considered, as they were not considered or relied upon by any of the courts below, and were not raised in the Pretrial Order.

As noted, the only basis for jurisdiction considered by the courts below was the applicability of the exception set forth in the first clause of 28 U.S.C. § 1605(a)(2). And, because the District Court ruled on the first day of trial that it would not reconsider the jurisdictional determination, EXPORTADORA did not put on evidence regarding jurisdiction, including facts showing the inapplicability of alternative bases of jurisdiction.

It is a well-settled principle of appellate jurisprudence that review is limited to those issues decided by the courts below, and this principle has been applied in cases decided under the FSIA. See Republic of Argentina v. Weltover, ___ U.S. ___, 112 S.Ct. 2160, 2164, 119 L.Ed.2d 394, 403 (1992) (limiting the issue on appeal to the third clause of § 1605(a)(2), which was the only clause relied on in the proceedings below); Federal Insurance Co. v. Richard I. Rubin & Co., supra, 12 F.3d at 1277 n.2 (declining "the parties' invitation to address whether the district court could exercise jurisdiction under the FSIA non-commercial tort exception because the district court failed to rule on the applicability of this exception..."). Consequently, EXPORTADORA would respectfully submit that the alternative bases for jurisdiction argued by plaintiffs are not ripe for consideration at this time. And, because these alternative bases for jurisdiction were not specifically raised in the Pretrial Order, plaintiffs are barred from subsequently raising them. Fed. R. Civ. P. 16(e); Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978).

However, given the emphasis which plaintiffs have been giving this argument in proceedings before the Court of Appeals, EXPORTADORA believes it necessary to address one of the specific alternative grounds for jurisdiction argued by plaintiffs, the "waiver" exception set forth in 28 U.S.C. § 1605(a)(1). This exception was not alleged in plaintiffs' complaint, was not in the Pretrial Order, was not raised in the District Court, and was not ruled on by any of the courts considering the jurisdiction issue.

Plaintiffs' waiver argument is based on the fact that at trial, EXPORTADORA did not contest the issue of jurisdiction. However, this decision not to contest the issue was not the result of an intent to waive jurisdiction, but instead was in deference to the District Court's specific ruling, on the first day of trial, that it would not reconsider the prior jurisdiction determination. EXPORTADORA immediately filed a supplemental memorandum on the second day of trial, arguing that the District Court was not bound by the factual findings made in support of the prior

decision, but the District Court refused to change its ruling. Thereafter, the District Court affirmed on a number of occasions that it would not reconsider the jurisdiction issue.

> THE COURT: We passed that long ago. I advised both counsel that we are not reviewing the facts and findings relied upon by the Court of Appeals in order to arrive at its legal rulings that courts of the United States have jurisdiction over this matter – both over the parties and subject matter and that issue will not be revisited...

In light of the District Court's ruling, EXPORTADORA conceded only that because the Court of Appeals had previously held on interlocutory appeal that jurisdiction existed, and because the District Court would not reconsider that issue, EXPORTADORA's counsel would not proffer evidence at trial regarding the absence of jurisdiction.

However, until the District Court's ruling, EXPORTADORA had contested jurisdiction at every available opportunity. The first responsive pleading to plaintiffs' complaint was a motion to dismiss, arguing that EXPORTADORA was immune from the District Court's jurisdiction because of its status as a "foreign state" for the purposes of the FSIA. When that motion to dismiss was denied by the District Court, EXPORTADORA appealed the order to the Court of Appeals. While the appeal was still pending, EXPORTADORA filed its first answer to the complaint, and the first affirmative defense alleged in that answer was that the District Court "lacks subject matter jurisdiction over each and every claim alleged against EXPORTADORA." Further, all of EXPORTADORA's answers to plaintiffs' subsequent amended complaints specifically raised, as the first affirmative defense, the District Court's lack of subject matter jurisdiction over EXPORTADORA.

The pretrial order filed with the District Court in this case

lists subject matter jurisdiction as the first issue of fact to be litigated, and as the first issue of law to be litigated. And, after trial, EXPORTADORA specifically requested reconsideration of the prior jurisdictional ruling in its opening brief on appeal, and filed a "Letter Brief" on the jurisdiction issue. Finally, after the Court of Appeals' decision, EXPORTADORA filed a petition for rehearing, seeking reconsideration of the jurisdictional determination.

"[C]ourts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." Rodriguez v. Transnave, Inc., 8 F.3d 284, 287 (5th Cir. 1993). Obviously, EXPORTADORA, by its consistent challenge to jurisdiction, has in no way evidenced an intent to waive its immunity. And, "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991); Drexel Burnham Lambert v. Committee of Receivers, 12 F.3d 317, 324-326 (2d Cir. 1993) (no waiver where defendant filed a motion to dismiss for lack of jurisdiction).

While EXPORTADORA did not contest jurisdiction at trial, this was only because the District Court specifically ruled that it would not entertain argument on that issue. It simply cannot reasonably be disputed that EXPORTADORA never intended to waive its right to assert sovereign immunity on appeal, and a finding of jurisdiction cannot be made on that ground.

CONCLUSION

Plaintiffs' action was based on events which occurred in Mexico. That is the country where the travel arrangements were made, that is the country where Aviones was contracted with, and that is the country where the flight both departed from and was to land in. To hold that sovereign immunity can be vitiated solely because of a momentary, unexpected nexus with the United States,

leaves open the possibility of a dramatic expansion of the jurisdictional reach of the United States courts over foreign sovereigns. Such an expansion of jurisdiction is not in keeping with the Congressional intent evidenced by the Foreign Sovereign Immunities Act, and is not in keeping with the Supreme Court's decision in Saudi Arabia v. Nelson; indeed, it is patently disrespectful of the laws of the Government of Mexico. That being the case, petitioner EXPORTADORA requests that this Court grant the instant petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: October 6, 1994

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